

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ADIDAS AMERICA, INC., a Delaware
corporation,

Civil No. CV-08-91-ST

Plaintiff and Counterclaim
Defendant,

OPINION AND ORDER

v.

MICHAEL D. CALMESE, a resident of
Arizona,
Defendant and Counterclaimant.

STEWART, Magistrate Judge:

For the second time, defendant, Michael Calmese (“Calmese”), seeks to supplement the summary judgment record. On August 17, 2009, this court denied Calmese’s request to reopen the summary judgment motion in order to present more evidence, consisting of affidavits of actual confusion, nearly 10 years of sales accounting and a judgment for lost sales. This court

concluded that all of the documents that Calmese produced to plaintiff, adidas America, Inc. (“adidas”), during discovery were, in fact, made part of the summary judgment record by adidas, and that it was too late for Calmese to supplement the summary judgment record with documents not produced or disclosed in response to adidas’ discovery requests. In addition, any new affidavits of consumer confusion would not have changed this court’s conclusion that Calmese failed to create an issue of fact as to a likelihood of confusion between adidas’s use of the phrase “prove it” in its t-shirt design and Calmese’s PROVE IT! trademark.

Calmese now seeks to supplement the record with his income tax returns for the years 2002 through 2007 to confirm already produced evidence that he received income from sales of his products. He explains his delay by the fact that he only recently obtained these tax returns from his tax preparer. Although he first contacted his tax preparer on or about September 5, 2008, to prepare these tax returns, he did not make final arrangements until August 2009 to pay for its services due to the financial strain of litigating this matter. On or about September 5, 2009, Calmese forwarded his Bank of America accounting information, and the tax returns were completed and delivered to him on or about September 10, 2009.

For the reasons stated in its prior Order, this request comes much too late. On August 28, 2008, this court ordered Calmese to produce all responsive documents to adidas’ discovery requests, including tax returns, by September 28, 2008 (docket # 28). If Calmese needed or desired additional time to produce any of his tax returns, he should have moved the court for an extension of that deadline long ago. Furthermore, adidas received copies of Calmese’s 2006 and 2007 tax returns on August 13, 2009, as exhibits attached to Calmese’ Declaration (docket #114). Calmese does not explain how he obtained these two tax returns before September 10, 2009, the

date when he now claims that he first obtained the 2002 through 2007 tax returns. This discrepancy casts doubt on Calmese's credibility.

In any event, Calmese argues only that his tax returns will confirm evidence that was already filed in connection with the summary judgment motion. If so, then they are duplicative and not material. Moreover, it appears that Calmese primarily wants them as part of the record because of the proceedings pending before the Trademark Trial and Appeal Board ("TTAB") which have been suspended for this litigation. This court perceives no reason why Calmese cannot submit this evidence directly to the TTAB as and when appropriate.

Asserting that Calmese's motion is yet another baseless filing, adidas requests that the court require Calmese to seek and obtain court authorization before filing anything further in this action and also to award sanctions in the form of an award of attorney fees incurred to respond to the motion. That request is denied. This court does not view Calmese's motion as constituting the type of inappropriate behavior in his communications with adidas that requires the imposition of sanctions.

ORDER

Defendant's Opposed Motion for Leave to File Federal Taxes (docket #126) is DENIED without any imposition of sanctions.

DATED October 7, 2009.

/s/ Janice M. Stewart

JANICE M. STEWART

United States Magistrate Judge